

Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

Editing Template

CAUTION: Take care not to remove or otherwise edit Project Data fill-point areas (Basic Information, Contract Details and Project Team) when making edits to this document.

AGREEMENT made as of the « » day of « » in the year « »
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status and address)
« » « » « »

and the Construction Manager:
(Name, legal status and address)
« » « »
« »

for the following Project:
(Name and address or location)
« » « »

The Architect:
(Name, legal status and address)
« » « »
« »

The Owner's Designated Representative:
(Name, address and other information)
« »
« »
« »
« »
« »
« »

The Construction Manager's Designated Representative:
(Name, address and other information)
« »
« »

ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™-2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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The Architect's Designated Representative:
(Name, address and other information)

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The Owner and Construction Manager agree as follows.

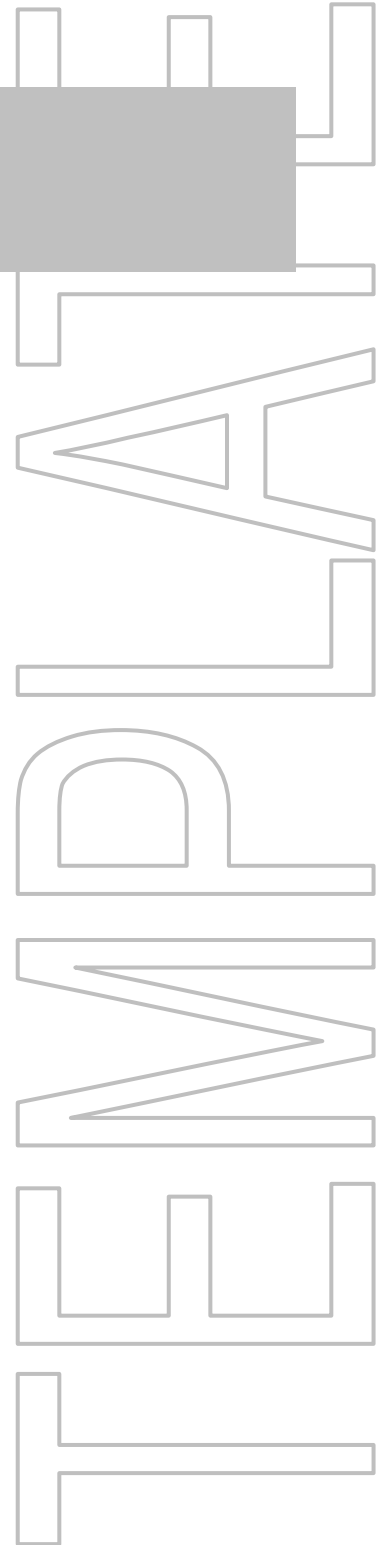


TABLE OF ARTICLES

1	GENERAL PROVISIONS
2	CONSTRUCTION MANAGER'S RESPONSIBILITIES
3	OWNER'S RESPONSIBILITIES
4	COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES
5	COMPENSATION FOR CONSTRUCTION PHASE SERVICES
6	COST OF THE WORK FOR CONSTRUCTION PHASE
7	PAYMENTS FOR CONSTRUCTION PHASE SERVICES
8	INSURANCE AND BONDS
9	DISPUTE RESOLUTION
10	TERMINATION OR SUSPENSION
11	MISCELLANEOUS PROVISIONS
12	SCOPE OF THE AGREEMENT
13	EQUAL BUSINESS OPPORTUNITIES PLAN
14	WORKFORCE DEVELOPMENT PLAN

ARTICLE 1 GENERAL PROVISIONS

§ 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

§ 1.2 Standard of Care

The Construction Manager shall perform the Construction Manager's Preconstruction Services and Construction Services at a level, and be judged by a standard of care, that is consistent with the standards and quality prevailing among first-rate, nationally recognized construction management and general contracting firms of superior knowledge, skill and experience engaged in projects of similar size and complexity. Construction Manager shall carry out and complete the Preconstruction Services and the Construction Services in an efficient, economical and timely manner, as expeditiously as is consistent with the level of skill and care required hereby and the interests of Owner, and in strict accordance with the Contract Documents.. Nothing in this Agreement shall be deemed to require, authorize, or permit the Construction Manager to perform any act which would constitute the practice of architecture, professional engineering, certified public accounting or law requiring licensure under the laws of the State of North Carolina for which the Construction Manager is not licensed to perform.

§ 1.3 General Conditions

For the Preconstruction Phase, AIA Document A201™–2007, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in A201–2007, as modified (the “General Conditions”), which document is incorporated herein by reference. The term "Contractor" as used in General Conditions shall mean the Construction Manager.

ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

Construction Manager shall perform and provide the Preconstruction Services and the Construction Services and the Work required by, or reasonably implied by or inferable from, the Contract Documents, shall be responsible for the construction of the Project in strict conformance with the requirements of the Contract Documents, and shall pay for all labor, supervision, materials, supplies, furnishings, equipment and things required by the Contract Documents. In performing its duties hereunder, Construction Manager shall be a fiduciary to the Owner in whom the Owner may place its full trust and confidence. The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Agreement.

§ 2.1 Preconstruction Phase

§ 2.1.1 During the Preconstruction Phase, the Construction Manager shall perform the services set forth in Sections 2.1, 2.2 and 2.3 of this Agreement, (the "Preconstruction Services"). Construction Manager's performance of the Preconstruction Services must occur within the Preconstruction Services duration set forth herein.

§ 2.1.1 PROJECT REVIEW

§ 2.1.1.1 The Construction Manager shall serve as an integral part of the project team and shall meet with the Owner, the Architect, consultants, other design team members and stakeholders to fully understand the design program, the design documents, the project scope and all other pertinent aspects of the Project.

§ 2.1.1.2 The Construction Manager shall develop written Project procedures, in cooperation with the Owner and the Architect, which shall be used as a guide for the management and coordination of the Project throughout the life of the Project.

§ 2.1.1.3 The Construction Manager shall provide the Owner and the Architect with a written evaluation of the Owner's Project program and the Project budget, each in terms of the other with recommendations on the appropriateness of each.

§ 2.1.1.4 During the preconstruction phase, the Construction Manager shall recommend in writing to Owner and the Architect methods, techniques, systems, materials, and value engineering ideas which will maximize cost savings to keep the Guaranteed Maximum Price for Project within the Project budget. The Construction Manager shall monitor development of design documents prepared by the Architect in light of the Project budget, and shall monitor material, building system, equipment and labor costs. If in the course of such activities, the Construction Manager determines that material, building system, equipment or labor cost changes will significantly impact the then currently anticipated cost for the Project, the Construction Manager shall promptly inform the Owner and the Architect of such change (and the reasons for the change), and recommend measures to contain cost so that the Project budget is not exceeded.

§ 2.1.1.5 The Construction Manager shall consult with, advise, assist and make recommendations in writing to the Owner and the Architect in the preparation of the design criteria, the building program for the Project and the step-by-step development of all plans, drawings and specifications for the Project throughout each design phase. In performing such services, but without assuming design responsibility, the Construction Manager as a member of a team consisting of the Architect and the Owner, shall:

- .1 review all design documents, and advise and make recommendations with respect to such factors as constructability; construction feasibility; cost impacts and possible economies; availability and utilization of materials, labor and equipment; time requirements for procurement and construction, and performance standards and maintenance expense upon completion.
- .2 assist the Architect and the other designated design professionals in the review of all sections of the plans and specifications to minimize areas of conflict and overlap in the work to be performed by the various trade contractors;

.3 review the drawings and specifications as they are being prepared, in order to advise and assist in the coordination thereof, the preparation of a release sequence thereof, the elimination of ambiguities and conflicts therein, and the avoidance of omissions and conflicts with applicable laws and regulations; and

.4 verify that the Contract Documents include requirements and assignment of responsibilities for (i) safety precautions and programs and temporary Project facilities for common use of Construction Manager, trade contractors and separate contractors and (ii) site coordination and staging and storage areas for common use of the Construction Manager, Subcontractors and sub-subcontractors.

§ 2.1.2 Consultation during Pre-Construction Services

§ 2.1.2.1 The Construction Manager shall attend regularly all scheduled meetings and other meetings that may be required with the Owner, the Architect, consultants, other design team members and stakeholders, to advise them on matters relating to site use, improvements, selection of materials, building methods, construction details, building systems and equipment, phasing and sequencing. While the services will be performed during the pre-construction phase, the advice will relate to matters that may arise during the pre-construction phase and during the construction phase. The Construction Manager shall provide written recommendations to the Owner on construction feasibility.

§ 2.1.2.2 The Construction Manager shall schedule and attend regularly scheduled meetings with the Owner and the Architect for the review of the Project.

§ 2.1.2.3 The Construction Manager shall be responsible for providing written minutes of all meetings that occur in the pre-construction and construction phases, which are attended by the Construction Manager or the Construction Manager's appointed representative. Within three (3) business days after the meeting date the Construction Manager shall prepare the minutes of the meeting in MSWord software "DOC" file extension format, and shall transmit via e-mail the minutes to the Owner, the Architect, and other concerned parties.

§ 2.1.3 VALUE ENGINEERING

§ 2.1.3.1 The Construction Manager shall, after a complete review of the Project design program, evaluate the designs available at the time of the Construction Manager's commencement of pre-construction services, and obtain an understanding of the intent of the Owner and the Architect, provide Value Engineering services and offer cost savings suggestions and best value recommendations to the Owner. All recommendations shall be in writing and must be fully reviewed with the Architect and the Owner, and approved by the Owner prior to implementation.

§ 2.1.3.2 Value Engineering efforts shall be focused on items that support the Architect's efforts to create a design that is most effective in relation to costs, achieves the Project's stated functional requirements, and results in economical long term operational costs relative to issues of energy use and facility maintainability. Value Engineering studies shall include life cycle cost analysis as may be required to assist the Architect to achieve an appropriate balance between costs, aesthetics and function.

§ 2.1.3.3 Value Engineering efforts shall also take into consideration applicable constructability issues including but not limited to an analysis of site risks and construction risks which could impact the Project budget, schedule, or design.

§ 2.1.3.4 All Value Engineering studies must be provided on a timely basis within the design schedule.

§ 2.1.3.5 Value Engineering studies shall be continuous as the design is being developed.

§ 2.1.3.6 The Construction Manager shall conduct a major Value Engineering study at 100% design development (utilizing the 100% design development documents) which shall include, but not be limited to, the items noted below:

.1 Develop Value Engineering concepts for consideration.

.2 Brainstorming session(s) with design team, including providing the following:

.1 Written cost studies shall be produced and submitted to the City within two (2) weeks of the final brainstorming session.

- .2 Written pro/con evaluation of the cost studies shall be provided to the City within two (2) weeks after submission of the cost studies.
- .3 Formal presentation of the written study shall be conducted by the Construction Manager.
- .4 A formal written Value Engineering study document including a summary of Value Engineering items, applicable cost savings, selected items and their corresponding cost savings shall be presented to the Owner and Project Architect.
- .5 The Construction Manager shall also conduct Value Engineering studies during each of the construction document phases to evaluate specific items as requested by the Owner.

§ 2.1.3.7 Construction Manager will assist with value engineering efforts, however, Construction Manager assumes no design responsibility or liability for this effort whatsoever. If a value engineered item is accepted, the approved shop drawings and submittals will override those contained in the contract drawings and will become part of the Contract Documents. The value engineered item will then be incorporated into the revised contract drawings to reflect the value engineered change. The Owner assumes full responsibility that the appropriate design professional, including but not limited to Owner-hired architect, mechanical electrical or plumbing engineer, civil engineer, structural engineer or water consultant, as appropriate, have reviewed and approved each value engineering item.

§ 2.1.4 LOGISTICS PLAN/JOB-SITE FACILITIES/ENCLOSURES

§ 2.1.4.1 The Construction Manager shall develop a graphic logistics plan to help analyze the project site, define the flow of labor and materials into the site and reduce offsite traffic impacts. The logistics plan will show locations of all temporary construction facilities, including hoists, offices, and scaffolding, refuse removal chutes, crane positioning, safety equipment, staging areas, etc. The plan will also reference surrounding roads, parking, offices, stadiums and activities that may be affected. The logistic plan will attempt to maintain a smooth flow of material and labor around the job site and maintain an efficient project schedule.

§ 2.1.4.2 The logistics plan must be provided on a timely basis within the design schedule and shall be continuously updated as the design is being developed.

§ 2.1.4.3 The Construction Manager shall furnish and arrange for all job-site facilities, equipment, utilities, and services necessary to enable the Construction Manager, the Owner, and the Architect to perform their respective duties as indicated by the Architect in the Contract Documents.

§ 2.1.4.4 The Construction Manager shall ascertain what temporary enclosures, if any, of building areas should be provided for and may be provided as a practical matter, in order to assure orderly progress of the work in periods when extreme weather conditions are likely to be experienced. The Construction Manager shall submit to the Owner and the Architect the Construction Manager's recommendations as to needed requirements of this nature and as to the contract or contracts in which they should be included.

§ 2.1.4.5 Phased Construction

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

§ 2.1.5 OWNER SUPPLIED INFORMATION

§ 2.1.5.1 In the pre-construction phase, the Owner shall furnish to the Construction Manager the Project site surveys, soil reports, subsurface investigations, legal limitations, utility locations, a legal description, information, reports, drawings and tests required by law and or herein with reasonable promptness at the Owner's expense.

§ 2.1.5.2 Any information provided by the Owner and made available to Construction Manager is subject to the following provisions: The information is made available for the convenience of the Construction Manager and is not a part of the Contract Documents. The Owner has not determined the accuracy or completeness of such information, and all such information is made available to the Construction Manager without any representation or

warranty by the Owner whatsoever as to its accuracy, completeness, or relevancy. The Construction Manager shall independently evaluate such information for its use and shall be entitled to reasonably rely on its accuracy only to the extent it has determined such information is accurate, complete, or relevant consistent with the applicable standard of care used by professional construction managers on similar projects, that there is no reason to conclude such information is inaccurate, incomplete, or irrelevant.

§ 2.1.6 CONSTRUCTABILITY REVIEW

§ 2.1.6.1 The Construction Manager shall be thoroughly familiar with the evolving Contract Documents through schematic design, design development, and contract document phases. The Construction Manager shall make recommendations on construction feasibility and practicality to the Architect and the Owner with respect to the selection of methods, materials, and systems and recommend cost reducing alternatives. The Construction Manager shall furnish pertinent information as to the availability of materials and labor that will be required.

§ 2.1.6.2 Constructability review is defined as including but not limited to a review by the Construction Manager of all drawings, documents, engineering reports & studies, soil boring logs, environmental studies and reports, and specifications in order to minimize and reduce project related risks associated with interdisciplinary coordination in the design, scheduling requirements, sequencing and phase conflicts during construction, sub-trade schedule conflicts, completeness and clarity of contract documents, drawings and specifications to determine, in its capacity as a professional Construction Manager (and without assuming any responsibility for those items for which the architect and design professionals are primarily responsible), errors, document omissions, inconsistencies, change order potential, building code compliance, any local, state, or federal regulations, ADA/accessibility compliance, accessibility to site, availability of labor, review of proposed construction methods, contracting strategies, construction materials availability and cost, procurement management strategies to reduce costs and avoid escalation, fabrication requirements, and delivery times.

§ 2.1.6.3 Constructability review shall also consist of the identification and estimate of costs in order to determine whether the Project budget is sufficiently funded in order to account for reasonably anticipated or commonly encountered construction risks.

§ 2.1.6.4 The Construction Manager shall perform the constructability review to determine the Project's constructability within its budget. All issues identified as creating a risk to the Project or potentially impacting constructability or budget shall be identified in a written report submitted to both the Owner and the Architect. At a minimum, the written report shall contain: (1) a description of each constructability issue with background information including potential cost impact; (2) a summary of the Construction Manager's in-depth study/research; and, (3) written recommendations for addressing the issue and minimizing the risk and reducing the cost impact to the Project.

§ 2.1.6.5 The Construction Manager shall promptly notify the Owner and the Architect in writing upon observing any features in the design that appear to be ambiguous, confusing, conflicting or erroneous, or otherwise have the potential to impact the schedule, budget or quality of construction during the construction phase.

§ 2.1.6.6 At completion of the Construction Manager's review of the plans and specifications, except only as to specific matters as may be identified by appropriate comments pursuant to this section, the Construction Manager shall warrant, without assuming any architectural or engineering responsibility, that the plans and specifications are consistent, practical, feasible, coordinated and constructible. Beginning at the time of proposing the preliminary guaranteed maximum price, the Construction Manager shall warrant that the work described in the plans and specifications for the Projects is constructible within the scheduled construction time.

§ 2.1.6.7 It is not the Construction Manager's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Contract Documents are at variance therewith, the Construction Manager shall promptly notify the Architect and the Owner in writing.

§ 2.1.7 CONSTRUCTION COST MODEL/ESTIMATES

§ 2.1.7.1 The Construction Manager shall develop a project budget / cost model (independent from any similar cost estimates required of the Project Architect such as the statement of probable construction costs) which shall be updated at the end of each design phase to include conceptual design, schematic design, design development and

construction documents during which the Construction Manager is performing pre-construction services (hereinafter referred to as the "Construction Manager Cost Model Update").

§ 2.1.7.2 The Construction Manager shall prepare and submit the construction cost model and all subsequent updates within ten (10) days after the Architect's completion of the design documents for each phase (or within such reasonably longer period of time as agreed to by the Construction Manager, the Architect and the Owner for the milestone deliverables listed below): schematic design phase estimate, design development phase estimate, 50% construction document phase estimate and a preliminary guaranteed maximum price proposal (based on 100% construction documents) pursuant to Section 2.2.1. Each estimate shall consist of the following documents:

- .1 In the preparation of each statement of construction cost, Construction Manager shall thoroughly review all available project documentation, make detailed take-offs and price the work, consult with qualified subcontractors as required (without cost unless authorized by Owner), visit the site and refer to Construction Manager's experience on similar projects.
- .2 If applicable, a comparative summary with the previous estimate, along with detailed rationale for any changes.
- .3 List of allowances (and the basis for each allowance).
- .4 List of alternates with the corresponding decision dates.

§ 2.1.8 EARLY PROCUREMENT/LONG-LEAD TIME ITEMS/MARKET STRATEGY

§ 2.1.8.1 The Construction Manager shall effect a bid package and pre-bid conference program to develop maximum bidder interest and to fully define the work so as to minimize contingencies for unknowns.

§ 2.1.8.2 The Construction Manager shall recommend to the Owner and the Architect a list and a schedule for the procurement by the Owner of long-lead time items which will be required to meet the schedule for the Project. If the Owner determines, in its own best interest, to procure such long-lead time items, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price Proposal for the Project, all contracts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager.

§ 2.1.8.3 If the Owner chooses not to procure long lead time items prior to the bid of the Project, the Architect shall list the items and a delivery schedule in the bid documents and the Construction Manager shall notify the potential Subcontractors of the required schedule that they should take into consideration in their bid. The Construction Manager shall carry out an active program of stimulating interest in the Project by potential qualified Subcontractors.

§ 2.1.8.4 The Construction Manager shall monitor the construction market conditions to identify factors that might affect costs and time for completing the project and report to the Owner and the Architect on the Construction Manager's findings. The Construction Manager shall make a written report and make recommendations on availability of labor, material, equipment, potential bidders, and possible conflicts in the bidding environment and their possible impact.

§ 2.1.8.5 The Construction Manager shall structure an appropriate market strategy to develop and administer maximum competition for all major elements of the work. As part of this effort, the Construction Manager shall:

- .1 Make recommendations regarding the division of the work in the plans and specification into optimum bidding packages.
- .2 Prior to the end of bidding phase, prepare for the City's review, comment and approval, a list of bidders qualified to perform each item of Work.

§ 2.1.9 COORDINATION OF CONSTRUCTION DOCUMENTS

§ 2.1.9.1 The Construction Manager shall review all drawings and specifications as they are being prepared, recommending alternative solutions whenever design details affect costs, construction feasibility or schedules. The Construction Manager shall notify the Architect and the Owner in writing upon observing any features in the

drawings or specifications which appear to be ambiguous, confusing, conflicting or erroneous.

§ 2.1.9.2 The Construction Manager shall provide a thorough interdisciplinary coordination review, performed by qualified personnel, of the construction drawings and specifications utilizing a structured and industry accepted process. The Construction Manager shall provide the City with all review comments and review the final documents to see that all comments have been incorporated.

§ 2.1.9.3 The Construction Manager shall verify that all value engineering and constructability issues have been incorporated into the final approved plans and included in the Guaranteed Maximum Price. All ambiguous, confusing and/or erroneous features discovered by the Construction Manager (but not acting in the capacity as a licensed design professional) in the plans or specifications or that would have been reasonably apparent or identifiable by professional construction managers working on similar projects shall be deemed to be corrected and any associated costs shall be included in the Guaranteed Maximum Price.

§ 2.1.9.4 All design and construction documents including but not limited to drawings, specifications, cost estimates, engineering reports, site assessments and other related project documentation are to be checked and stamped by the Construction Manager and submitted to the Owner. The Construction Manager shall maintain a written index of all documents received, the date received, date reviewed, date revised, the parties to whom distributed and date of certification.

§ 2.1.10 Construction Services Contract Intent

It is Owner's intention to enter into an Exhibit A, the "Guaranteed Maximum Price Amendment" agreement, setting a Guaranteed Maximum Price upon the successful completion of preconstruction services; however, the Owner reserves the right to solicit competitive estimates, bids or proposals at any time during the preconstruction phase if it is in Owner's best interest.

§ 2.1.11 SELECTION OF SUBCONTRACTORS

Selection of Subcontractors for the Project shall be conducted as follows:

§ 2.1.11.1 The Construction Manager shall prequalify Subcontractors for all Work. The prequalification criteria shall be determined by the Owner and the Construction Manager to address quality, performance, the time specified for performance of the Project, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the Owner. The Construction Manager shall investigate and develop Subcontractor interest in the Project and shall furnish to the Owner and Architect for their information a list of possible Subcontractors from whom bids will be requested for each principal portion of the Work. The Architect will promptly reply in writing to the Construction Manager if the Architect or Owner knows of any objection to such Subcontractor. The receipt of such list shall not require the Owner or Architect to investigate the qualifications of proposed Subcontractors nor shall it waive the right of the Owner or Architect later to object to or reject any proposed Subcontractor. After the Construction Manager has submitted a list of possible Subcontractors to the Owner and Architect and has received any objection to any Subcontractor, the Construction Manager shall solicit and obtain bids from each non-objectionable Subcontractor to perform each portion of the Work. In addition, the Owner may designate specific persons or entities that the Construction Manager must prequalify prior to bidding.

§ 2.1.11.2 The Construction Manager shall publicly advertise for Subcontractor bids as follows. Bids shall be invited by advertisement in a newspaper having general circulation in the City of Durham or by electronic means, or both. A decision to advertise solely by electronic means, whether for particular parts of the Work or generally for all Work on the Project, shall be approved in advance by the Owner. The advertisements for bidders shall comply with North Carolina General Statutes and Durham City Code. The advertisement shall: (i) state the time and place where plans and specifications of proposed work or a complete description of the apparatus, supplies, materials, or equipment may be had; (ii) state the time and place for opening of the sealed bids; and (iii) reserve to the Owner and Construction Manager the right to reject any or all bids.

§ 2.1.11.3 All bids shall be opened publicly, and once they are opened, shall be public records under Chapter 132 of the North Carolina General Statutes. The Construction Manager shall act as the fiduciary of the Owner in handling and opening bids.

§ 2.1.11.4 The Construction Manager shall award subcontracts for the Work to the lowest responsible, responsive bidder, taking into consideration quality, performance, the time specified in the bids for performance of the Work, the cost of construction oversight, time for completion, compliance with North Carolina General Statute § 143-128.2 (see Section 2.1.12 below), and other factors deemed appropriate by the Owner and advertised as part of the bid solicitation. However, the Owner may require the selection of a different Subcontractor for any portion of the Work, provided such Subcontractor is acceptable to the Construction Manager in its reasonable discretion. However, in no event shall any subcontract awarded by the Construction Manager be binding on the Construction Manager or the Owner until and unless the Owner accepts the Construction Manager's Guaranteed Maximum Price proposal for the Project and issues a Notice to Proceed.

§ 2.1.11.5 The Construction Manager may perform a portion of the Work only if (i) bidding produces no responsible, responsive bidder for that portion of the Work, the lowest responsible, responsive bidder will not execute a contract for the bid portion of the Work, or the Subcontractor defaults and a prequalified replacement cannot be obtained in a timely manner, and (ii) the Owner, approves of the Construction Manager's performance of that portion of the Work.

§ 2.1.12 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs, including but not limited to North Carolina General Statute § 143-128.2 and the Ordinance for the Equal Business Opportunity Program in City contracting under Article III of Chapter 18 of the Durham City Code (as the same may be amended from time to time). Prior to soliciting bids for any Subcontractors, the Construction Manager shall submit its plan for compliance with N.C. General Statute § 143-128.2 and the Ordinance for the Equal Business Opportunity Program in City contracting under Article III of Chapter 18 of the Durham City Code for the entire Project for approval by the Owner. Once the proposed plan is approved by the Owner, the Construction Manager and the Subcontractors shall comply at all times with the approved plan.

§ 2.2 PRELIMINARY GUARANTEED MAXIMUM PRICE PROPOSAL

§ 2.2.1 When the Drawings and Specifications for the Project are sufficiently complete, the Construction Manager shall propose a Preliminary Guaranteed Maximum Price for the Project, which shall include the Construction Manager's estimates for the Cost of the Work, Contract Compliance Costs, the Construction Contingency for the Project, and the Construction Manager's Fee for the Project.

§ 2.2.2 Basis of Preliminary Guaranteed Maximum Price Proposal and Contract Time

The Construction Manager shall include with the Preliminary Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract, which were used in preparation of the Preliminary Guaranteed Maximum Price proposal;
- .2 A list of allowances and a statement of their basis;
- .3 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Preliminary Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications;
- .4 A statement of the proposed Preliminary Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and other items: the Contract Compliance Costs; the Construction Contingency; and the Construction Manager's Fee that together sum to the Preliminary Guaranteed Maximum Price;
- .5 The anticipated date of Substantial Completion upon which the proposed Preliminary Guaranteed Maximum Price is based, a critical path method schedule for the work and a schedule of the Construction Documents issuance dates for the Project upon which the date of Substantial Compliance is based; and,
- .6 A date on or before which the Owner can accept the Preliminary Guaranteed Maximum Price without further written acceptance by the Construction Manager.

§ 2.2.3 The Construction Manager shall meet with the Owner and Architect to review each Preliminary Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction

Manager, who shall make appropriate adjustments to the respective Preliminary Guaranteed Maximum Price proposal, its basis, or both.

§ 2.3 Guaranteed Maximum Price Proposal

§ 2.3.1 When the Drawings and Specifications for the Project are sufficiently complete, the other Preconstruction Services described in Sections 2.1 and 2.2 for the Project are complete, and all Preconstruction Services are complete, the Construction Manager shall propose the Guaranteed Maximum Price for the Project, which shall be the sum of the accepted bids for the Cost of the Work for the Project, any necessary estimates for the Cost of the Work for the Project where no acceptable or responsive bids were received, Contract Compliance Costs, the Construction Contingency for the Project, and the Construction Manager's Fee.

§ 2.3.2 As the Drawings and Specifications for the Project may not be finished at the time a Guaranteed Maximum Price proposal is prepared, the Construction Manager shall provide in the Guaranteed Maximum Price for further development of the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment which may be incorporated by Change Order.

§ 2.3.3 BASIS OF GUARANTEED MAXIMUM PRICE

The Construction Manager shall include with the Guaranteed Maximum Price proposal for the Project a written statement of its basis, which shall include:

- .1 A list of the Drawings and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the Guaranteed Maximum Price proposal.
- .2 A list of allowances and a statement of their basis.
- .3 A list of the clarifications and assumptions made by the Construction Manager in the preparation of each Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
- .4 The proposed Guaranteed Maximum Price, including a list of the subcontracts and their bid amounts; a statement of the estimated cost organized by trade categories, allowances, contingency, and other items; the Contract Compliance Costs; the Construction Contingency; and the Construction Manager's Fee that together sum to the Guaranteed Maximum Price.
- .5 The Date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, a critical path method schedule for the work and a schedule of the Construction Documents issuance dates for the Project upon which the date of Substantial Completion is based.
- .6 The date on or before which the Owner can accept the Guaranteed Maximum Price without further written acceptance by the Construction Manager.
- .7 Written report verifying compliance with the Equal Business Opportunities Plan.

§ 2.3.4 The Construction Manager shall meet with the Owner and Architect to review each Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discovers any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the respective Guaranteed Maximum Price proposal, its basis, or both.

§ 2.3.5 After review of the Guaranteed Maximum Price proposal, the Owner may, in its sole and exclusive discretion, accept or reject the Guaranteed Maximum Price proposal.

§ 2.3.6 Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by the Construction Manager.

§ 2.3.7 Prior to the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal and issuance of a Notice to Proceed on the Project, the Construction Manager shall not incur any cost for the Project to be reimbursed as part of the Cost of the Work or the Contract Compliance Costs, except as the Owner may specifically authorize in writing.

§ 2.3.8 Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis shall be set forth in a fully completed and executed the Guaranteed Maximum Price Amendment for the Project. The Guaranteed Maximum Price shall be subject to additions and deductions by a change in the Work as

provided in the Contract Documents, and the Date of Substantial Completion for the Project shall be subject to adjustment as provided in the Contract Documents.

§ 2.3.9 The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. Such revised Drawings and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect and Construction Manager. The Construction Manager shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

§ 2.4 Construction Phase

Upon commencement of the Construction Phase for the Project, the Construction Manager shall oversee the performance of the Work as described in Section 2.3 of this Agreement and as set forth in the Contract Documents, and shall comply with the requirements of Sections 2.4 and 2.5 of this Agreement.

§ 2.4.1 GENERAL

§ 2.4.1.1 The Construction Phase for the Project shall commence on the later of the following two required conditions: (1) the full completion and execution of the Guaranteed Maximum Price Amendment for the Project and (2) issuance of a Notice to Proceed on the Project. If the Owner and Construction Manager agree the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

§ 2.4.2 ADMINISTRATION

§ 2.4.2.1 The Subcontractors whose bids are accepted and used by the Construction Manager to determine the Cost of the Work and to calculate the Guaranteed Maximum Price shall be the Subcontractors used by the Construction Manager unless the Owner authorizes or requires another subcontractor to be used..

§ 2.4.2.2 If the Guaranteed Maximum Price has been established and a qualified bidder has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner thereafter requires that another Subcontractor be used, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the qualified bid of the bidder and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.4.2.3 Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.

§ 2.4.2.4 The Construction Manager shall schedule and conduct meetings at which Owner, Owner's Designated Representative, Architect, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute minutes.

§ 2.4.2.5 Promptly after the Owner's acceptance of the Guaranteed Maximum Price proposal and issuance of a Notice to Proceed on the Project, the Construction Manager shall prepare a schedule for the Work and submittal schedule in accordance with Section 3.10 of the General Conditions, including the Owner's occupancy requirements.

§ 2.4.2.6 The Construction Manager shall provide monthly written reports to the Owner, Owner's Designated Representative and Architect on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered, and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect.

§ 2.4.2.7 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the

Owner and Architect and shall provide this information in its monthly reports to the Owner, Owner's Designated Representative and Architect at regular intervals.

§ 2.5 Professional Services

Section 3.12.10 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

§ 2.6 Hazardous Materials

Section 10.3 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

ARTICLE 3 OWNER'S RESPONSIBILITIES

§ 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide information in a timely manner regarding the requirements of the Project, including a program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability requirements, special equipment and systems and site requirements.

§ 3.2 Owner's Designated Representative

The Owner has identified the Owner's Designated Representative authorized to act on behalf of the Owner with respect to the Project. The Owner's Designated Representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. The Owner's Designated Representative will have the right to visit the Project at such intervals as deemed appropriate by the Owner's Designated Representative. However, no actions taken during such site visit(s) by the Owner's Designated Representative shall relieve the Construction Manager of its obligations as described in the Contract Documents. The Owner's Designated Representative will not have control over, will not be in charge of, and will not be responsible for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work, since these are solely the responsibility of the Construction Manager. The Construction Manager shall not rely on oral or other non-written communications from the Owner's Designated Representative. Except as otherwise provided in Section 4.2.1 of the General Conditions, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 3.3 Architect

§ 3.3.1 Definition of Architect

As used in the Contract Documents, "Architect" shall refer to any design professional which Owner may determine to be appropriate for performing the design services, including structural, mechanical, electrical, or other design services necessary for the Project. The use of "Architect" as a defined term does not require Owner to hire an architect. The Owner may, in its sole discretion, hire design professionals including, but not limited to, engineers, designers, architects, landscape architects, or other design or service professionals appropriate for the Project.

§ 3.3.2 Architect's Services

The Owner shall retain an Architect to provide services, duties and responsibilities as described in the agreement between Owner and Architect, including normal structural, mechanical and electrical engineering services, other than cost estimating services. The Owner may authorize and cause the Architect to perform any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. Such services shall be provided in accordance with time schedules agreed to by the Owner, Architect and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect, from which compensation provisions may be deleted.

ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

§ 4.1 Compensation

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as follows:

§ 4.1.2 For the Construction Manager's Preconstruction Phase services described in Sections 2.1 and 2.2:
(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within <> (<>) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.

§ 4.2 Payments

§ 4.2.1 Payments shall be made monthly Following Payments are due and payable « Thirty » («30 ») days from the date the Construction Manager's Invoice is received by the Owner. Amounts unpaid after the date on which payment is due shall bear simple interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the place where the Project is located.
(Insert rate of monthly or annual interest agreed upon.)

«8.00» % «per annum»

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds. The Contract Sum is the Cost of the Work as defined in Section 6.1. of this Agreement, the Contract Compliance Costs as defined in Section 6.2 of this Agreement, and the Construction Manager's Fee.

§ 5.1.1 The Construction Manager's Fee shall be set forth in the Exhibit A, the Guaranteed Maximum Price Amendment.

§ 5.1.2 The Contract Compliance Costs for the Project shall be set forth in Exhibit A, the Guaranteed Maximum Price Amendment.

«»§ 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time.

COSTS WHICH WOULD CAUSE A GUARANTEED MAXIMUM PRICE TO BE EXCEEDED SHALL BE PAID BY THE CONSTRUCTION MANAGER WITHOUT REIMBURSEMENT BY THE OWNER.

(Insert specific provisions if the Construction Manager is to participate in any savings.)

«N/A»

§ 5.2.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 5.3 Changes in the Work

§ 5.3.1 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document the General Conditions, General Conditions of the Contract for Construction.

§ 5.3.2 In calculating adjustments to subcontracts the adjustments shall be made in accordance with the terms of those subcontracts subject to contained in Article 7 of the General Conditions.

§ 5.3.3 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of the General Conditions shall mean the Cost of the Work as defined in Article 6 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1 Costs to Be Reimbursed

§ 6.1.1 The term Cost of the Work shall mean the items set forth in this Section 6.1. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1.1 through 6.1.7 and are subject to review and verification by the owner or Architect at the Owner's discretion, prior to reimbursement by Owner to Construction Manager. Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment.

§ 6.1.2 Labor Costs

Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops.

§ 6.1.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

§ 6.1.4 Costs of Materials and Equipment Incorporated in the Completed Construction

.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

2 Costs of materials described in the preceding Section 6.4.1.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.1.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities (excluding office facilities for the Construction Manager, the Owner and the Architect), machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and are employed or fully consumed in the performance of the Work; cost on such items if they are turned over to the Owner and accepted by the Owner at the end of the Project. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

.2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation and delivery, installation, lubrication,, minor repairs and replacements, dismantling and removal. Rental rates shall be consistent with those prevailing in the area. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval.

.3 Costs of trash and debris control and removal of from the site of the Work and its proper and legal disposal.

.4 Costs for any Project site items not referenced herein, not normally provided by the subcontractors, which will be provided by the Construction Manager as required to complete the Work. All such costs must be approved in advance in writing by the Owner.

- .5 Costs for efficient logistical control of the site, including horizontal and vertical transportation of materials and personnel and including costs for adequate storage and parking space.
- .6 Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.

§ 6.1.6 Other Costs

Other costs incurred in the performance of the Work if and only to the extent approved in advance in writing by the Owner.

§ 6.1.7 Emergencies and Repairs to Damaged or Nonconforming Work

The Cost of the Work shall also include costs described in Section 6.1.1 which are incurred by the Construction Manager.

- .1 In taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.2 of the General Conditions.
- .2 In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this agreement of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, Subcontractors or suppliers.

§ 6.1.8 CONSTRUCTION CONTINGENCY

§ 6.1.8.1 The Guaranteed Maximum Price for the Project shall include a Construction Manager's Construction Contingency in an amount to be approved in writing by the Owner. This is intended to cover some risks assumed by the Construction Manager in providing the Guaranteed Maximum Price.

§ 6.1.8.2 The Construction Manager acknowledges that this contingency is included to assume the risk and cover matters which may not have been taken into consideration by the Construction Manager in establishing the Guaranteed Maximum Price, including, but not limited to, scope gaps between trade contractors; contract default by trade contractors; cost of corrected work; unforeseen conditions; design omissions and gaps which the Construction Manager should have reasonably discovered during the discharge of its Preconstruction Services, and no more than Fifty Thousand Dollars for legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld. It is further understood that the construction contingency is the maximum sum available from the Owner to the Construction Manager to cover costs incurred as a result of such unanticipated causes, events or details. The Construction Manager understands that cost overruns in excess of the amount of the construction contingency will be borne solely by the Construction Manager, except that legal fees as defined above in excess of Fifty Thousand Dollars may justify a Change Order pursuant to Section 7.2 of the General Conditions.

§ 6.1.8.3 Prior to the application of the Construction Manager Contingency to any items, the Construction Manager will notify the Owner's representative in writing of the Construction Manager's intent to apply any part of the construction contingency. The Owner shall deny or approve in writing the charging of any expenses to the construction contingency, such approval shall not be unreasonably withheld. Notwithstanding the Owner's right to deny the use of the construction contingency for specific requests, the Construction Manager may include such costs in its Applications for Payment upon notification prior to receipt of the Owner's written approval or denial. In the event that the Construction Manager receives payment for costs charged to the construction contingency that are later denied by the Owner, an adjustment shall be made on the next Application for Payment to reflect the overpayment and the amount due to Construction Manager shall be reduced by that amount. Any of the construction contingency for the Project that is left at the conclusion of the Project shall revert back to the Owner. Each schedule of values submitted with an Application for Payment subsequent to the use of contingency funds shall clearly set out a separate line item for each such use.

Costs associated with the Construction Manager's compliance with the General Conditions and the Contract Requirements, not otherwise described in Section 6.1 and not otherwise excluded by Section 6.3 shall be agreed upon between the Owner and the Construction Manager at the time the Guaranteed Maximum Price is determined. Such Contract Compliance Costs shall be fixed at a stipulated sum set forth in the Guaranteed Maximum Price Amendment, after which the Contract Compliance Costs stipulated sum shall not be adjusted unless a Contract Compliance cost is increased due to an approved Change Order. Any adjustment to a Contract Compliance Cost stipulated sum due to a Change Order shall be stated in writing in the Change Order. Contract Compliance costs are not part of the Cost of the Work. The Contract Compliance costs shall include:

- Name

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made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses, judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the Guaranteed Maximum Price and provided that such royalties, fees and costs are not excluded by the last sentence of Section 3.17 of the General Conditions or other provisions of the Contract Documents.

- .10 Data processing costs, Project photographs and shop drawing reproductions related to the Project.
- .11 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.
- .12 Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
- .13 That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling outside of the City of Durham in discharge of duties connected with the Work.
- .14 Reproduction costs, costs of telegrams, postage and express delivery charges, telephone at the site and reasonable petty cash expenses of the site office.
- .15 Costs for site security fencing and other site security services for the Project as the Construction Manager deems necessary to protect the Project.
- .16 Costs for pre-construction services as described herein.

§ 6.3 Costs Not To Be Reimbursed

§ 6.3.1 The Cost of the Work shall not include:

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .5 Rental costs of machinery and equipment, except as specified in Section 6.1.5.2.6 Except as provided in Section 6.1.7.2 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .7 Any cost not specifically and expressly described in Sections 6.1.1 to 6.1.7;
- .8 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded; and
- .9 Costs for services incurred during the Preconstruction Phase.

§ 6.4 Discounts, Rebates and Refunds

§ 6.4.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

§ 6.4.2 Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.5 Accounting Records

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts related to the cost of the Work, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

§ 7.1 Progress Payments

§ 7.1.1 Based upon Applications for Payment submitted to the Architect by the Construction Manager and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

«N/A»

§ 7.1.3 Provided that an Application for Payment is received by the Architect not later than the « 1st » day of a month, the Owner shall make payment to the Construction Manager not later than the « 25th » day of the «same» month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than «Thirty» («30») days after the Architect receives the Application for Payment.

(Federal, state or local laws may require payment within a certain period of time.)

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based on the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 7.1.7 Each application for payment shall be based upon the schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire guaranteed maximum price among the various portions of the Work, except that the Contractor's fee shall be shown as a separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the

Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's applications for payment.

- .1 Applications for payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the application for payment. The percentage completion shall be the percentage of that portion of the Work which has actually been completed.
- .2 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:
 - .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values;
 - .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
 - .3 Add the Construction Manager's Fee : the Contractor Manager's portion of the fee for construction phase services shall be an amount which bears the same ratio to the total fee as the total payment described in the two preceding clauses bears to the cost of the Work defined in the Contract Documents;
 - .4 Subtract retainage as provide in Section 7.1.7.3 ;
 - .5 Add actual Contract Compliance Costs incurred, as defined in § 6.2 of this Agreement, subject to the limitation that no payment shall be made for Contract Compliance Costs in excess of the amount stated in Guaranteed Maximum Price Amendment
 - .6 Subtract the aggregate of previous payments made by the Owner;
 - .7 Subtract the amount, if any, by the Construction Manager in the has been previously overpaid as evidenced by the Owner's accountant review of the Construction Manager's documentation or by any audit of Construction Manager's records; and
 - .8 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the General Conditions.
 - .9 Subtract retainage as provided in Section 7.1.7.3.
- .3 Retainage shall be calculated as five percent of the costs and fees calculated pursuant to Sections 7.1.7.2.1, 7.1.7.2.2, and 7.1.7.2.3. Retainage shall be held by the Owner until satisfactory final completion and close out of the Project. Satisfactory completion and close out of the Project means that the Owner and the Architect are satisfied that the Project has been completed in accordance with the plans and specifications and within the guaranteed maximum price, all General Conditions pertaining to close out have been satisfied, and all Subcontractors have satisfactorily completed their Work.
- .4 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment, which have not been delivered and stored at the site.
- .5 If after the project is deemed fifty percent (50%) complete based upon the Construction Manager's gross project invoices, excluding the value of materials stored off-site, except that the value of the materials stored on-site shall not exceed 20% of the Construction Manager's gross project invoices for the purpose of determining the percent completion of the Project, and the Construction Manager provides Owner and the Architect the following:
 - .1 Written verification evidencing 50% completion of the Project; and,
 - .2 Written consent of the surety named in the project performance and payment bonds agreeing that the Owner shall not retain any further retainage from periodic payments due to the Construction Manager;the Owner shall cease holding retainage from future periodic payments if the Owner finds that the Construction Manager is performing satisfactorily, and any nonconforming work identified in writing by the Architect or owner (prior to the point of 50% project completion) has been corrected by the Construction Manager and accepted by the Architect or Owner, whoever provided such prior notice of nonconforming work. If, however, the Owner determines the Construction Manager's performance is unsatisfactory, the Owner may reinstate the specified retainage for each subsequent periodic payment. Notwithstanding anything to the contrary, Owner may assess retainage after 50% project completion, even if the Construction Manager has complied with Sections 7.1.7.5.1 and 7.1.7.5.2 and continues to

perform satisfactorily as necessary to retain two and one-half percentage (2.5%) total retainage through the completion of the Project.

- .6 If by or before the Project is deemed 50% complete and one hundred percent (100%) performance has been completed for the following "early" finishing trades: (1) structural steel; (2) piling; (3) caisson; or (4) demolition; and after receipt by the Owner of an approval or certificate from the Architect that such early finishing work is acceptable and in accordance with the Contract Documents, and after the Construction Manager provides Owner and the Architect the following:
 - .1 The early finishing trade subcontractor's written request for such payment; and,
 - .2 Written consent of the surety named in the project performance and payment bonds agreeing that the Owner shall make such early finishing trade payment;the Owner shall make full payment to the Construction Manager for said 100% completed early finishing trade work less retainage of five-tenths percent (0.5%)(of the early finishing trade contract) upon the later occurrence of (1) 60 days receipt of said early finishing trade subcontractor's written request, or (2) immediately upon receipt of said written consent of the surety.
- .7 Within 60 days of receipt by owner of (1) a pay request and (2) written consent of the surety, and after Owner has either (1) received a certificate of substantial completion, or (2) received beneficial occupancy or use of the project (if applicable), the Owner shall pay an amount sufficient to increase total payment to Construction Manager to the Contract Price, less such amounts as the Architect shall determine in accordance with the Final Payment provisions of Section 7.2, including up to 250% of the Architect's estimate of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.
- .8 Notwithstanding any of the retainage provisions described herein, there shall be no retainage on periodic or final payments for contracts having a total project cost less than \$100,000.00, and, in addition to any retainage amounts allowed to be held by the Owner, the Owner shall also retain all rights allowed under this Agreement to withhold payment to the Construction Manager for unsatisfactory job progress, defective or nonconforming construction not remedied, disputed work, or third-party claims filed against the Owner or reasonable evidence that a third-party claim will be filed.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be consistent with the percentage of retainage on payments made by the Owner to the Construction Manager. The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

§ 7.1.11 The Owner may agree to reduce the amount of retainage withheld from the Construction Manager's Applications for Payment in accordance with a written application by the Construction Manager to allow it to reduce the retention the Construction Manager is withholding from payments to Subcontractors that have achieved final completion of the entire scope of the Subcontractor's work. Any amounts by which the Owner reduces retainage for this purpose are to be used by the Construction Manager for the sole purpose of making payments to the specific Subcontractor(s) identified in the application. Any such application by the Construction Manager shall include all final documents required of each Subcontractor to be paid.

§ 7.2 Final Payment

§ 7.2.1 Final payment shall be made by the Owner to the Construction Manager as provided in Section 9.10 of the General Conditions and when

- .1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of the General Conditions, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and
- .3 a final Certificate for Payment has been issued by the Architect.

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

- «.4 Take the sum of the Project's Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee for the Project, but not more than the Guaranteed Maximum Price.
- .5 Subtract amounts, if any, for which the Architect withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of the General Conditions or other provisions of the Contract Documents.
- .6 Subtract the aggregate of previous payments made by the Owner.
- .7 The Parties agree that, in order to make a final determination of Cost of the Work to be reflected in the final Application for Payment and the Final Payment, the Parties shall meet to reconcile ("Reconciliation") all estimated costs and reimbursable expenses of the Project. The Parties agree that once the Reconciliation has been agreed by the Parties, all such costs and reimbursable expenses shall be deemed final.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.

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§ 7.2.2 The Owner's accountants will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the General Conditions. The time periods stated in this Section supersede those stated in Section 9.4.1 of the General Conditions.

§ 7.2.3 If the Owner's accountants report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without seeking a further decision of the Architect. Unless agreed to otherwise, a demand for mediation of the disputed amount shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to make such demand within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.4 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

§ 7.3 OWNERS' RIGHT TO AUDIT

The Owner's accountants may review the Construction Manager's final accounting. The Construction Manager shall maintain all records relating to the Project and this contract including, but not limited to, records of costs and shall make all records available to the Owner's accountants upon request.

ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager covenants and agrees that, prior to the commencement of any Work, the Construction Manager shall obtain the following insurance from companies authorized to do business in the State of North Carolina having a Best rating of A- or better and which shall, unless otherwise expressly set forth herein, be maintained by Construction Manager at all times during construction on or about the Project site until Completion of the Work (including any warranty or corrective work pursuant to the Contract Documents):

- .1 Commercial General Liability insurance with per occurrence limits not less than One Million dollars (\$1,000,000) and aggregate limits not less than Five Million Dollars (\$5,000,000) for bodily injury and property damage covering the Project site and all streets, alleys, and sidewalks adjoining or appurtenant to the Project site on which construction activities relating to the Project occur, and such insurance shall provide premises-operations liability, products and completed operations, broad form contractual liability, independent contractors, XCU (explosion, collapse, underground damage), elevator liability, broad form property damage, personal injury and advertising liability; liability coverage limits may be reached by any combination of primary and umbrella/excess insurance;
- .2 Motor Vehicle Liability covering any vehicles (owned, non-owned, hired and leased by Construction Manager and all Subcontractors) with a combined single limit of \$1,000,000 ;
- .3 Workers' Compensation insurance providing statutory North Carolina benefits for all persons employed by (a) Construction Manager and (b) any Contractors and Subcontractors, in connection with any work performed in connection with the Contract Documents, and employer's liability insurance in an amount not less than \$1,000,000. There shall be a waiver of subrogation in favor of the City;
- .4 Builder's risk and installation insurance: inland marine form, all risk coverage including theft and flood & earthquake; insurance shall apply to the work completed as well as all fixtures, furnishing, furniture, equipment, machinery and building materials of any kind whatsoever, both on-site and off-site, while in transit, during loading, unloading, hoisting and testing, written on a replacement cost basis with an annual automatic inflation update, and naming Owner as additional insured as their interests may appear, which insurance shall contain an endorsement stating that "permission is granted to complete and occupy", a waiver of subrogation clause, a "loss clause" providing that full coverage is reinstated after a loss, and if any off-site storage location is used, shall cover for full insurable value, all material and equipment on or about any such off-site storage location intended for use with respect to the Site(s); and have a maximum deductible of **\$100,000** without written approval of the Finance Director of the City of Durham; In addition, Construction Manager shall also require all subcontractors and vendors to provide insurance coverage for materials and equipment which is stored either on-site or off-site, prior to its installation for the purpose of its intended use. Subcontractors and vendors shall be responsible for any builders' risk deductible on any losses incurred to work provided under their Subcontracts.
- .5 Umbrella or Excess Liability – Contractor may satisfy the minimum liability limits required above under an Umbrella or Excess Liability policy. There is no minimum Per Occurrence limit of liability under the Umbrella or Excess Liability, however, the Annual Aggregate limits shall not be less than the highest 'Each Occurrence' limit for required policies. Contractors agrees to endorse City of Durham as an 'Additional Insured' on the Umbrella or Excess Liability, unless the Certificate of Insurance states the Umbrella or Excess Liability provides coverage on a 'Follow-Form' basis.
- .6 Such other insurance as may be reasonably required of a prudent Construction Manager in such amounts as from time to time reasonably may be required by the Owner.

§ 8.2 ADJUSTMENT OF INSURANCE CLAIMS

Construction Manager shall adjust all claims with its insurers. However, Construction Manager shall not adjust any liability claims without the prior written consent of the Owner unless the effect of such adjustment shall be to release the Owner and all Indemnitees from all liability with respect to such claims and liabilities asserted therein. Further, Construction Manager shall not adjust any property claims without prior written consent of the Owner unless the effect is to make the Owner whole and protect the Owner's financial interest in the proceeds of the claim.

§ 8.3 ADDITIONAL INSURED

All liability insurance required pursuant to this Article 8 (except for employer's liability) shall name the Owner and Owner's Designated Representative as an additional insured as its interests may appear, and an original of the

endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, the agent may so indicate in the GL section in lieu of an original endorsement).

§ 8.4 FAILURE TO OBTAIN AND MAINTAIN INSURANCE

If Construction Manager fails to obtain and maintain the insurance required pursuant to this Article 8 and the General Conditions, or if any insurer cancels or modifies such insurance without consent of the Owner, at the Owner's election (but without any obligation to do so), the Owner may, with written notice to Construction Manager specifying the coverages obtained and the parties insured, procure similar insurance coverage and deduct the entire cost (or part thereof) from the amounts payable by the Owner to Construction Manager pursuant to Article 7. The Construction Manager has an affirmative obligation to provide notice to the Owner of any modification or cancellation of policies required by this contract. Construction Manager shall not perform Work during any period when any policy of insurance required hereunder is not in effect.

§ 8.5 PERFORMANCE BOND AND PAYMENT BOND

§ 8.5.1 The Construction Manager shall furnish bonds covering faithful performance of the Project and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof shall be included in the Cost of the Work for the Project. The amount of the bond shall at all times be equal to or greater than **One Hundred Percent (100%)** of the Guaranteed Maximum Price.

ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Sections 15.3 of the General Conditions except that, during the Preconstruction Phase, no decision by the Architect shall be a condition precedent to mediation.

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ARTICLE 10 TERMINATION OR SUSPENSION

§ 10.1 TERMINATION FOR CONVENIENCE

Owner may for any reason whatsoever terminate or suspend performance of the Preconstruction Services, the Work, this Agreement, or any part of any of them, for Owner's convenience pursuant to Article 14 of the General Conditions. Owner shall give written notice of such termination to Construction Manager specifying when termination becomes effective and the scope thereof.

§ 10.2 CEASING PERFORMANCE UPON TERMINATION

§ 10.2.1 From and after the effective date of any termination, Construction Manager shall not incur, nor permit any Subcontractor to incur, any further expense or obligations in connection with the terminated portion of the Work or Preconstruction Services. From and after the effective date of any termination, Construction Manager shall cease performance and cause the Subcontractors to cease performance, to the extent of the terminated portion of the Work or Preconstruction Services. In the event of termination of this Agreement, Construction Manager shall terminate outstanding Subcontracts and purchase orders related to the terminated portion of the Work or Preconstruction Services unless directed to do otherwise by Owner. Unless directed otherwise by Owner, Construction Manager shall settle the liabilities and claims arising out of the termination of the Subcontracts. If requested by Owner, Construction Manager shall vacate the Project site immediately.

§ 10.2.2 Owner may direct Construction Manager to assign, and Construction Manager hereby agrees to assign, Construction Manager's right, title and interest under open or terminated subcontracts or purchase orders to Owner or its designee. To the extent that the Owner elects to take assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. Subcontracts, purchase orders and rental agreements entered into by the Construction Manager for the Project shall contain provisions permitting assignment to the Owner as described above.

§ 10.3 SUBMISSION OF TERMINATION CLAIM

In the event of termination of all or any part of the Preconstruction Services, the Work or this Agreement for convenience, Construction Manager shall, within thirty (30) days after the effective date of termination, submit a written termination claim to Owner specifying the amounts due because of the termination together with costs, pricing, and other supporting documentation or data required by Owner. Construction Manager's failure to file a termination claim within such thirty (30) day period shall constitute a waiver of any claim to compensation relating to the termination. If a proper termination claim is submitted, then Owner shall pay Construction Manager an amount derived in accordance with Section 14.4 of the General Conditions.

§ 10.4 TERMINATION FOR CAUSE

If Construction Manager refuses or fails to perform its Preconstruction Services or other duties under this Agreement in a timely manner, supply enough properly skilled supervisory personnel, labor or proper equipment or materials, make prompt payment to its Subcontractors or to Construction Manager's employees, or comply with Applicable Laws, or if Construction Manager is otherwise guilty of a material breach of this Agreement or any warranty made herein, then Owner may, by written notice to Construction Manager, notify the Construction Manager of the cause for termination and provide a reasonable period of time in which the Construction Manager shall cure the identified cause for termination. If the Construction Manager fails to completely cure the identified cause for termination within the time set forth by the Owner, then without prejudice to any other right or remedy, the Owner may terminate the employment of Construction Manager, in whole or in part, and take possession of the Project site, the Contract Documents, Subcontracts, Project Documentation in the possession of Construction Manager, and all equipment and materials at the site.

§ 10.5 ERRONEOUS TERMINATION FOR CAUSE

In the event the employment of Construction Manager is terminated by Owner for cause and it is subsequently determined by a court or other tribunal of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Section 14.4 of the General Conditions and the provisions of Section 14.4 of the General Conditions regarding compensation shall apply.

ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in General Conditions.

§ 11.2 Ownership and Use of Documents

Section 1.5 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

§ 11.3 Governing Law and Venue

The Contract shall be governed by the law of the State of North Carolina. Venue for any and all claims or causes of action arising out of the Contract or arising out of any action or inaction related to the Contract shall be solely and exclusively in the North Carolina State Court, Superior Court Division in Durham County, North Carolina.

§ 11.4 Assignment

Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to this Agreement. Except as provided in Section 15.2.2 of the General Conditions, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 11.5 Other provisions:

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ARTICLE 12 SCOPE OF THE AGREEMENT

§ 12.1 This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager. Priority of interpretation of Contract Documents shall be as set forth in Section 1.2.1 of the General Conditions.

§ 12.2 The following documents comprise the Agreement:

- .1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor, as modified and supplement herein, and where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price
- .2 AIA Document A201–2007, General Conditions of the Contract for Construction as modified;
- .3 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed, or the following:

«N/A»

- .4 AIA Document E202™–2008, Building Information Modeling Protocol Exhibit, if completed, or the following:

«N/A»

- .5 Other documents:
(List other documents, if any, forming part of the Agreement.)

« [City to insert Tax Exhibit and any other relevant documents] »

ARTICLE 13 EQUAL BUSINESS OPPORTUNITIES PLAN

§ 13.1 General requirements.

- .1 The Construction Manager and the Director of the City's Department of Equal Opportunity/Equity Assurance (EO/EA) shall develop a Small Disadvantaged Business Enterprise ("SDBE") Strategic Plan to maximize contracting opportunities for goods and services for small disadvantaged businesses certified by the City (SDBEs). The Construction Manager shall comply with all applicable provisions of Article III of Chapter 18 of the Durham City Code (Equal Business Opportunity Program), as amended from time to time.
- .2 The project goals for SDBE participation, including lower tier subcontractors and vendors shall be determined by the Owner and set forth in an approved SDBE Strategic Plan.
- .3 In all solicitations for which the established goal(s) are applicable, the Construction Manager will not enter into contracts for goods or services without first soliciting bids from SDBEs and requiring bidders to submit a Participation Plan to meet the goal(s). Bidders must state their SDBE participation in a manner like that required by bidders on contracts to be awarded by the City. If a bidder fails to achieve the goal(s), the bidder must submit documentation to the Construction Manager of its good faith efforts to achieve the goal(s) within two working days after bid opening. The Construction Manager shall take all reasonable actions needed to see that bidders comply with this subsection (iii). The Construction Manager shall make bids and documentation of good faith efforts available to the Director.
- .4 The Construction Manager will solicit SDBE interest in upcoming contracting opportunities to ascertain the availability of SDBEs that might be capable of servicing the bid opportunities. Each such notice shall be given in a manner and schedule so that the SDBEs will have a reasonable amount of time to respond as outlined in the SDBE Strategic Plan.
- .5 The Construction Manager will provide quarterly reports on all contracting activity to the Director for reporting to the City Council. The reports are due the 15th day of April (for January – March), July (for April – June), October (for July – September) and January (for October – December).
- .6 The Construction Manager shall comply with all applicable provisions of Article III of Chapter 18. The failure of the Construction Manager to comply Article III of Chapter 18 shall be a material breach of contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of that chapter, this contract, and State law. The Participation Plan submitted by the Construction Manager in accordance Article III of Chapter 18 is binding on the Construction Manager.
- .7 Section 18-59(f) of Article III of Chapter 18 provides, in part, "If the City Manager determines that the Construction Manager has failed to comply with the provisions of the Contract, the City Manager shall notify the Construction Manager in writing of the deficiencies. The Construction Manager shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to the

Construction Manager's alleged violations of its obligations under Article III of Chapter 18 and not to the Construction Manager's alleged violations of other obligations.

§ 13.2 Remedies. The parties recognize that the City considers the obligations of the Construction Manager under Sections 13.1.1 through 13.1.7 to: (1) further an important policy of the City for the benefit of the public; (2) be material to this entire agreement, and (3) be part of the reason that the City is willing to enter into this agreement. The parties recognize that the City will suffer financial loss if the Construction Manager does not comply with its obligations under Section 13.1. The parties recognize that the City could terminate this agreement if the Construction Manager breaches its obligations under Section 13.1, and that such a termination would result in monetary losses to the City. The parties also recognize the delays, expense, and difficulty to both parties involved in proving or contesting the amounts of those losses. Instead of requiring proof of those amounts, it is agreed that Construction Manager shall be liable for and shall pay the City the amount specified herein as liquidated damages, and not as a penalty. The amounts stated as liquidated damages are agreed to be reasonable estimates of the City's losses and expenses for delays, including administrative costs. The City may collect liquidated damages by retaining moneys otherwise due Construction Manager in the amount of such damages, and by other legal means. Nothing in this Section 13.2 shall reduce the City's rights under other provisions of this agreement, any applicable statutes or ordinances, or any applicable principle of law. In its discretion, the City may waive some or all liquidated damages against the Construction Manager. Such a waiver is valid only if done by a signed writing that refers specifically to this Section 13.2 and specifically mentions "liquidated damages." If the City seeks an injunction to require compliance with any portion of Section 13.1, the Construction Manager hereby agrees to waive any contention that the injury from the noncompliance would not be irreparable or that the City has an adequate remedy at law.

§ 13.3 The damages shall be as follows:

- .1 For the Construction Manager's failure to comply with Section 13.1.3: One percent of the amount of the payments made by the Construction Manager under each contract entered into in violation of Section 13.1.3, unless the goals were met or good faith efforts were made with respect to that the contract.
- .2 For failure to make bids and documentation of good faith efforts available to the Director as required by Section 13.1.3: \$250 for the first occurrence of noncompliance; \$500 for the second occurrence; and \$1,000 for each subsequent occurrence.
- .3 For noncompliance with Section 13.1.4: One percent of the amount of the payments made by the Construction Manager under each contract entered into in violation of subsection 13.1.4, unless the goals were met or good faith efforts were made with respect to that the contract.
- .4 For noncompliance with Section 13.1.5: \$250 for the first occurrence of noncompliance; \$500 for the second occurrence of noncompliance; and \$1,000 for each subsequent occurrence.

§ 13.4 Definitions. In this document, words, including "SDBE" and the "Director" shall have the meaning assigned in Article III of Chapter 18 of the Durham City Code (Equal Business Opportunity Program), unless the context requires otherwise.

ARTICLE 14 WORKFORCE DEVELOPMENT PLAN

§ 14.1 The Workforce Development Plan established by Construction Manager, if applicable, is incorporated and made a part of this Agreement by reference.

§ 14.2 The Construction Manager shall provide to the Director of the Office of Economic and Workforce Development for the City of Durham a report on the first day of each calendar quarter demonstrating its compliance with the Workforce Development Plan (hereafter the "Workforce Development Plan".) If the Construction Manager fails to comply with this requirement the Owner will be damaged in amounts that will be difficult and expensive to determine. The Construction Manager and Owner therefore agree that as a reasonable estimate of the damages the Construction Manager shall pay liquidated damages to the Owner in the following amounts.

- .1 \$250 for the first occurrence of non-compliance;
- .2 \$500 for the second occurrence of non-compliance;
- .3 \$1,000 for each subsequent occurrence of non-compliance.

§ 14.3 Failure to comply with the Workforce Development Plan constitutes a breach of this Agreement. The

Director of the Office of Economic and Workforce Development shall determine whether the Construction Manager is in compliance with the Workforce Development Plan.

[SIGNATURES APPEAR ON THE FOLLOWING PAGES]

This Agreement is entered into as of the day and year first written above.

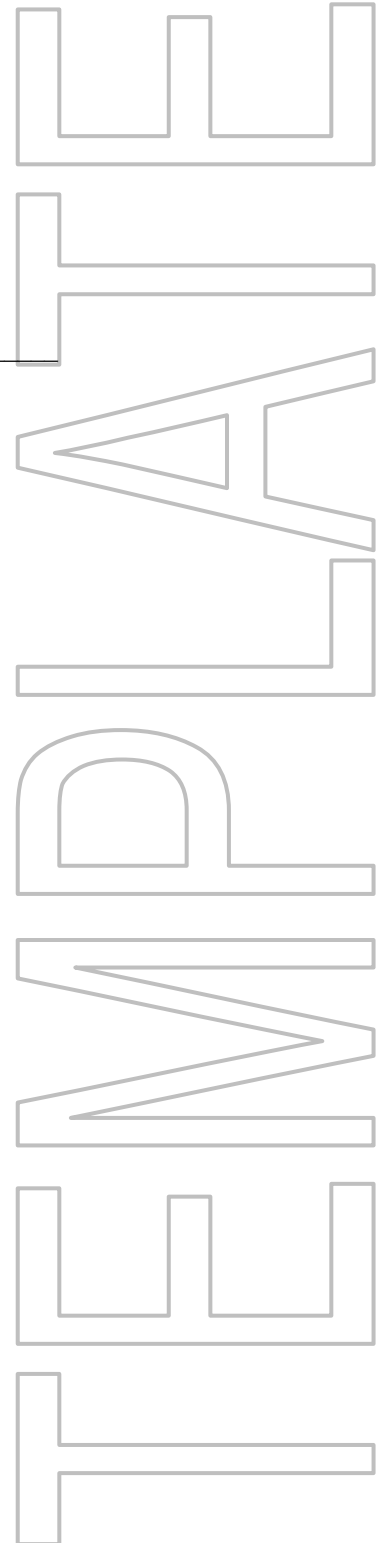
OWNER

CITY OF DURHAM

ATTEST:

By: _____

Preaudit Certification:



CONSTRUCTION MANAGER

[INSERT SIGNATURE FORM]

[INSERT NOTARY ACKNOWLEDGMENT]

